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No. 92-1212

In the Supreme Court of the United States

OCTOBER TERM, 1992

NO NAME VIDEO, LTD., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in enforcing two Internal Revenue Service summonses without conducting an evidentiary hearing when petitioners failed to offer evidence in support of their allegation that the summonses were issued for an improper purpose.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 22-42) and the opinion and order of the district court (Pet. App. 1-5) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 1992. The petition for a writ of certiorari was filed on January 19, 1993 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the course of an investigation into the income tax liabilities of Sanford Shapiro (taxpayer) for the taxable years 1986 through 1989, Internal Revenue Agent W. Donald Bell issued summonses to No Name Video, Ltd. and Satterfield, Inc. (petitioners), two corporations that were owned by taxpayer's wife, Maria Satterfield (Pet. App. 24-25). The summonses were issued pursuant to 26 U.S.C. 7602. They directed petitioners to appear, give testimony and produce their records for the period of January 1, 1986, through January 31, 1990 (Pet. App. 1-2).

2. When petitioners failed to comply, the United States filed a petition to enforce the summonses (Pet. App. 24-25). Petitioners opposed enforcement, arguing that the summonses were issued in bad faith and that the exclusive purpose for the IRS's investigation was to harass and embarrass taxpayer and his wife (*id.* at 36).

The district court rejected petitioners' contention and granted the government's motion for enforcement. The court declined to hold an evidentiary hearing on petitioners' allegations (Pet. App. 1-5). The court relied upon the record before it on the motion to enforce, as well as the record in a preceding case brought by taxpayer to quash five Internal Revenue summonses issued in connection with the same investigation (*id.* at 4). In the earlier case, the taxpayer had also contended that the IRS was conducting its investigation for an improper purpose (*id.* at 13). In support of his argument in that case, the taxpayer had submitted the affidavit of Julie Winiarski, a client of Satterfield, Inc., which stated

that the IRS told her that taxpayer had been placed on an IRS "hit list" of accountants whose clients' tax returns automatically would be selected for audit (*ibid.*). The district court had ordered enforcement of the summonses in the earlier case, without conducting an evidentiary hearing, because the affidavits submitted by taxpayer "[did] not convince the Court that there are specific facts suggesting wrongful conduct on the part of the IRS" (*id.* at 19).

In the present case, the district court, after considering the record of the prior litigation and reviewing the affidavit of the Internal Revenue Agent in charge of the investigation, found that the Internal Revenue Service had made a *prima facie* showing for enforcement of the summonses, which petitioners failed to rebut (Pet. App. 4). The court held that petitioners failed to advance any new arguments that would persuade the court that enforcement of the summonses would constitute an abuse of process (*id.* at 5).

3. The court of appeals affirmed (Pet. App. 22-42). The court concluded that petitioners did not bear their burden of establishing that the district court committed clear error in finding that the IRS had issued the summonses in good faith (*id.* at 42). The court of appeals also rejected petitioners' argument that the district court abused its discretion in enforcing the summonses without conducting an evidentiary hearing (*id.* at 38-39). The court held that a hearing was not required because petitioners failed to make a sufficient threshold showing that there was an improper purpose behind the summonses and did not "come forth with particularized facts of bad faith

by the IRS i[n] issuing summonses to the corporations" (*id.* at 38).

ARGUMENT

The court of appeals correctly concluded that the district court did not abuse its discretion in enforcing the summonses without conducting an evidentiary hearing. The decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Summons enforcement proceedings are designed to be summary in nature. See *Donaldson* v. *United States*, 400 U.S. 517, 529 (1971).* While a district court may, in the exercise of its discretion, allow the taxpayer an evidentiary hearing to substantiate his allegations and supplement offers of proof that the summons was not issued in good faith, the "right to an adversary hearing * * * is not absolute." *Hintze* v. *IRS*, 879 F.2d 121, 126 (4th Cir. 1989). Whether an evidentiary hearing should be conducted in the course of summons enforcement proceedings "is a matter committed to the sound discretion of the district court. There is no requirement that the court conduct such a hearing or permit discovery in each and every case. * * * [A] party challenging IRS summonses will be entitled to an adversary hearing only upon the production of some substantive evidence corroborating the claim of abuse." *Id.* at 126-127. See

* It is well settled that district courts may limit discovery in such proceedings. *Chen Chi Wang* v. *United States*, 757 F.2d 1000, 1004 (9th Cir. 1985); *United States* v. *Will*, 671 F.2d 963, 967-968 (6th Cir. 1982).

also *Copp* v. *United States*, 968 F.2d 1435, 1438 n.1 (1st Cir. 1992), cert. denied, No. 92-827 (Feb. 22, 1993); *Alphin* v. *United States*, 809 F.2d 236, 238 (4th Cir.), cert. denied, 480 U.S. 935 (1987); *United States* v. *Balanced Financial Management, Inc.*, 769 F.2d 1440, 1444 (10th Cir. 1985) (taxpayer must factually refute the government's showing or support a proper affirmative defense before evidentiary hearing is granted); *United States* v. *Tiffany Fine Arts, Inc.*, 718 F.2d 7, 14 (2d Cir. 1983) (only where a taxpayer has made a "substantial preliminary showing" of abuse of process is he entitled to an evidentiary hearing), aff'd, 469 U.S. 310, 324 n.7 (1985); *United States* v. *Kis*, 658 F.2d 526, 539 n.39 (7th Cir. 1981) ("This hearing is not, however, automatic. * * * [T]he taxpayer must make some threshold showing to be entitled to the hearing."), cert. denied, 455 U.S. 1018 (1982); *United States* v. *National Bank*, 622 F.2d 365, 367 (8th Cir. 1980) ("An evidentiary hearing is necessary only where substantial deficiencies in the summons proceedings are raised by the party challenging the summons.").

2. Petitioners err in contending (Pet. 14-17) that the decision in this case conflicts with *United States* v. *McCarthy*, 514 F.2d 368 (3d Cir. 1975), *United States* v. *Salter*, 432 F.2d 697 (1st Cir. 1970), *United States* v. *Harris*, 628 F.2d 875 (5th Cir. 1980), and *United States* v. *Church of Scientology of California*, 520 F.2d 818 (9th Cir. 1975), with respect to the threshold showing that must be made in order for a summoned party to obtain an evidentiary hearing.

In *United States* v. *McCarthy*, the court explained that "not every summons enforcement proceeding

will require an evidentiary hearing * * * [and that] if the person summoned neither puts in issue allegations of the complaint nor raises proper affirmative defenses, no evidentiary hearing will be required; the matter can be decided on the pleadings." 514 F.2d at 373. Although the Third Circuit afforded the taxpayer an evidentiary hearing in *McCarthy*, it did so only after concluding that the allegations raised "the possibility that the IRS agents charged with the investigation of defendant-corporation had no intention of pursuing any civil remedies as to bring into question their good faith" and the "defendant's allegations sufficiently raised the possibility that enforcement of the summons would result in a [prohibited] second inspection." *Id.* at 375-376. The decisions in *United States* v. *Salter*, 432 F.2d at 699-700 (facts alleged by respondent raised possibility of improper purpose on part of IRS), *United States* v. *Harris*, 628 F.2d at 880 (district court did not abuse discretion in holding evidentiary hearing, even though allegation that sole purpose of investigation was in aid of criminal prosecution was not raised in "preferred method" of supporting affidavit), and *United States* v. *Church of Scientology of California*, 520 F.2d at 825 (allegations of bad faith harassment "though thin, raised sufficient doubt about the Service's purposes to require the district court to hold a *limited* evidentiary hearing"), are to the same effect.

Those decisions manifestly do not support petitioners' proposition that the summoned party is entitled to an evidentiary hearing "upon alleging bad faith on the part of the IRS and without the necessity

of alleging particularized facts relating to the IRS motivation" (Pet. 16-17). Instead, those cases recognize that a party seeking an evidentiary hearing must make a sufficient showing of *facts*—not conclusory allegations—from which a court may infer a possibility of some wrongful conduct by the government. The courts held in those cases that the summoned parties *had* met their burden of showing facts that raised sufficient doubt regarding the agency's purpose in issuing the summonses to warrant further evidentiary inquiry. By contrast, in the present case, the district court concluded that petitioners had failed to rebut the affidavit signed by the Internal Revenue Agent detailing the proper basis for the summonses. On this record, the district court correctly deter-mined that no evidentiary hearing was required (Pet. App. 4-5).

3. District court decisions to enforce a summons without a hearing are reviewable under the abuse of discretion standard. *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 324 n.7 (1985); *Copp* v. *United States*, 968 F.2d at 1438 n.1; *United States* v. *Samuels, Kramer & Co.*, 712 F.2d 1342, 1348 (9th Cir. 1983); *United States* v. *Southeast First National Bank, Etc.*, 655 F.2d 661, 667-668 (5th Cir. 1981); *United States* v. *Harris*, 628 F.2d 875, 883-884 (5th Cir. 1980); *United States* v. *Wright Motor Co.*, 536 F.2d 1090, 1094 n.1 (5th Cir. 1976). "In order to have an 'abuse' [of discretion] in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of judgment but defiance thereof, not the exercise of reason but

rather of passion or bias." *Ibid.* (quoting *Spalding* v. *Spalding*, 94 N.W.2d 810, 811 (Mich. 1959)).

Petitioners failed to offer any evidence of deficiencies in the summons process. Nevertheless, they maintain that they were entitled to an evidentiary hearing so they could show that the IRS issued the summonses solely to harass and embarrass taxpayer and his wife, and that the summonses should therefore be quashed. In support of this argument, petitioners allege that the affidavit of Julie Winiarski —which stated that she was "extremely concerned about continuing to use Accounting Associates as [her] accountants" (Pet. App. 38)—constitutes evidence of an improper purpose on the part of the IRS. This contention is baseless. As the court of appeals correctly explained, "[w]hile there may be some incidental loss to appellants' businesses by virtue of the IRS investigation of Shapiro, such loss is merely speculative and is not evidence that the IRS is pursuing its investigation of Shapiro in bad faith" (*ibid.*).

There is no requirement that an evidentiary hearing be held when a taxpayer does not "develop facts from which a court might *infer a possibility* of some wrongful conduct by the Government." *United States* v. *Kis*, 658 F.2d at 540. The courts below correctly concluded that petitioners failed to meet that requirement in this case. The district court thus did not abuse its discretion in disposing of the case without an evidentiary hearing. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. at 324 n.7.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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